

LATHAM & WATKINS LLP
Michael W. De Vries (SBN 211001)
mike.devries@lw.com
Andrew Fossum (SBN 250373)
andrew.fossum@lw.com
650 Town Center Drive, 20th Floor
Costa Mesa, California 92626
Telephone: (714) 540-1235
Facsimile: (714) 755-8290

Attorneys for Plaintiff
SINHDARELLA, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SINHDARELLA, INC., a California
corporation,

Plaintiff,

v.

KEVIN VU, an individual, d/b/a/ THE
BOILING CRAB; and DOES 1 through 10,

Defendants.

CASE NO. C 07-04353 WHA

Honorable William H. Alsup

**PLAINTIFF SINHDARELLA, INC.'S
NOTICE OF MOTION AND MOTION FOR
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

[Declarations of Dada Ngo, Sinh Nguyen, Giang
Nguyen, Michael W. De Vries, Andrew Fossum,
Steven McFarland, and Appendices of Customer
and Employee Declarations filed concurrently
herewith; Proposed Order lodged concurrently
herewith]

Date: February 7, 2008
Time: 8:00 a.m.
Location: Courtroom 9

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 7, 2008, at 8:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 9, on the 19th Floor, of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff Sinhmarella, Inc. ("Sinhmarella") will, and does hereby, move this Court for an Order preliminarily enjoining Defendant Kevin Vu d/b/a THE BOILING CRAB ("Defendant") from using the name "The Boiling Crab" or any confusingly similar name, including the name "The Boiling Crawfish" in connection with the operation of any restaurant or providing any related restaurant services.

This Motion is made on the grounds that:


(1) Sinhmarella is likely to succeed on the merits of its trademark infringement claims against Defendant and will experience irreparable injury if Defendant is not enjoined from continuing to infringe Sinhmarella's trademark during the pendency of this action; and

(2) Sinhmarella has at least demonstrated that the balance of hardships weighs sharply in its favor.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the concurrently filed Declaration of Dada Ngo, Declaration of Sinh Nguyen, Declaration of Giang Nguyen, Declaration of Michael W. De Vries, Declaration of Andrew Fossum, Declaration of Steven McFarland, Appendices of Customer and Employee Declarations, the records and files herein, matters of which the Court may take judicial notice, and on all such further evidence and argument as may be presented in connection with this Motion.

Dated: December 28, 2007

LATHAM & WATKINS LLP

By 
Andrew Fossum, Esq.

Attorneys for Plaintiff
SINHDMARELLA, INC.

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Dada Ngo and Sinh Nguyen, thirty-something year old husband and wife co-founders and sole owners of Sinhwarella, Inc. (a corporate name derived from a combination of their names), had a vision to bring freshly prepared Louisiana-style seafood to patrons of their THE BOILING CRAB restaurant. Through hard work, high quality and innovative food offerings, a recognizable name, distinctive restaurant décor, and widespread media attention and recognition throughout the United States (and abroad), Sinhwarella's THE BOILING CRAB restaurants have enjoyed considerable success. Starting from the opening of their first restaurant in 2004 in California, Sinhwarella has managed to build a widespread chain of THE BOILING CRAB restaurants, including three locations in California, two in Texas, and plans to expand to other locations throughout the United States.

Unfortunately, others have sought to cash in on Sinhwarella's success and nationwide attention by imitating Sinhwarella's THE BOILING CRAB restaurants. While some copycats have limited their efforts to cashing in on Sinhwarella's widespread recognition and success by serving the same type of food that Sinhwarella serves, defendant Kevin Vu ("Defendant") has not. Defendant brazenly copied virtually every aspect of Sinhwarella's THE BOILING CRAB restaurants, including by using precisely the same name, a clearly copied menu, the interior look-and-feel, and even exactly the same hours of operation – all in a brazen attempt to free-ride on the coattails of Sinhwarella's hard work by profiting from confused consumers.

Although Defendant's attempt to emulate Sinhwarella's THE BOILING CRAB restaurants falls short in terms of the quality of Defendant's food and services, it is effective enough to have confused numerous consumers. Consumers are understandably confused by the virtually identical name, menu, hours, and efforts to replicate the interior décor of THE BOILING CRAB. Not surprisingly, consumers think that Defendant's San Jose restaurant called "The Boiling Crab" is affiliated with Sinhwarella's THE BOILING CRAB restaurants, and they go there expecting Sinhwarella's THE BOILING CRAB restaurant. Instead, according to the

1 reviews of Defendant's restaurant, they are sorely disappointed. The experience is so bad that
2 customers who have been to authentic THE BOILING CRAB restaurants often realize that
3 Defendant's restaurant could not be affiliated with THE BOILING CRAB, albeit only after being
4 lured into Defendant's restaurant by mistake. Unfortunately, other customers leave Defendant's
5 restaurant believing that the substandard experience had at Defendant's restaurant was actually
6 offered by a legitimate THE BOILING CRAB restaurant, thereby irreparably damaging the
7 substantial consumer goodwill that Sinh darella has, through hard work and ingenuity, built in its
8 THE BOILING CRAB restaurants.

9 Sinh darella has tried without success to persuade Defendant to voluntarily stop
10 using Sinh darella's THE BOILING CRAB trademark. Unfortunately, Defendant ignored
11 Sinh darella's repeated attempts to resolve this dispute without resorting to the courts, and
12 Sinh darella was forced to file suit. Even after filing suit, Sinh darella continued to attempt to
13 persuade Defendant to voluntarily cease his infringement during the pendency of this action, but
14 Defendant engaged in dilatory tactics and persisted in his refusal to stop infringing Sinh darella's
15 trademark. Moreover, within the last month or so, Defendant has actually *increased* the scope of
16 his infringement by preparing to open another infringing restaurant in Sacramento and obtaining
17 a domain name to promote his infringing restaurants.

18 At this point, it is clear that Sinh darella's only recourse for protecting its valuable
19 trademark from further irreparable harm during the pendency of this action is to seek a
20 preliminary injunction from the Court. Defendant has clearly demonstrated that any other course
21 of action would be futile. Every day that goes by, Sinh darella suffers additional injury from the
22 diversion of customers and damage to the goodwill associated with its THE BOILING CRAB
23 trademark caused by Defendant's continuing infringement. That injury is only increasing with
24 Defendant's expansion of his infringing activities. Because there is no question that Sinh darella
25 will prevail on the merits of its trademark infringement claims, and because the balance of
26 hardships tips decidedly in Sinh darella's favor, Sinh darella respectfully requests that the Court
27 grant Sinh darella's request for preliminary injunctive relief. If Defendant is not enjoined from
28

continuing to infringe Sinh darella's trademark during the pendency of this action, Sinh darella will suffer irreparable harm to its business reputation and future.

II. STATEMENT OF ISSUES TO BE DECIDED

Whether Sinh darella is entitled to a preliminary injunction enjoining Defendant from continuing to infringe Sinh darella's trademark during the pendency of this action where 1) Sinh darella has demonstrated that it is likely to succeed on the merits of its trademark infringement claims by showing a clear likelihood of confusion caused by Defendant's blatant trademark infringement; and 2) Defendant's use of Sinh darella's THE BOILING CRAB mark has already caused significant actual confusion among consumers and irreparably harmed Sinh darella, tipping the balance of hardships sharply in Sinh darella's favor.

III. STATEMENT OF FACTS

A. Sinh darella's THE BOILING CRAB Chain of Restaurants

Sinh darella is a corporation organized and existing under the laws of the State of California, with its principal headquarters located in Fountain Valley, California. (Declaration of Dada Ngo ("Ngo Dec.") at ¶ 2.) Sinh darella was founded by wife and husband, Dada Ngo, President and Sinh Nguyen, Secretary. (Ngo Dec. at ¶ 1; Declaration of Sinh Nguyen ("S. Nguyen Dec.") at ¶ 1.) Sinh darella operates a chain of restaurants under the trademark THE BOILING CRAB, which Sinh darella has used continuously since at least as early as 2003, and offers restaurant services and related products and services under that trademark. (Ngo Dec. at ¶ 3.) Sinh darella is also the owner of United States Trademark Registration Number 3,256,219 for the mark THE BOILING CRAB in connection with restaurant services in International Class 43. (Declaration of Michael W. De Vries ("De Vries Dec.") at ¶ 2, Ex. A.)

Sinh darella's THE BOILING CRAB restaurants offer Louisiana-style seafood, including blue crab, oysters, Dungeness crab, shrimp, and crawfish seasoned with THE BOILING CRAB restaurants' distinctive blends of spices and seasonings. (Ngo Dec. at ¶ 4.) Customers of THE BOILING CRAB restaurants are treated to a one-of-a-kind dining experience pioneered and provided by Sinh darella, characterized by the innovative food presentations,

1 unique menus, and distinctive restaurant décor of THE BOILING CRAB restaurants. (*Id.* at
2 ¶¶ 5-8.)

3 Sinhdarella has expended considerable time, effort, and money promoting and
4 advertising its chain of THE BOILING CRAB restaurants, further contributing to the recognition
5 and success of THE BOILING CRAB chain of restaurants. Today, Sinhdarella continues to
6 promote and advertise its THE BOILING CRAB restaurants through traditional advertising
7 channels. (*See, e.g., id.* at ¶¶ 9-10, Ex. E & F.) Sinhdarella also promotes its THE BOILING
8 CRAB restaurants through its extensive use of THE BOILING CRAB mark on T-shirts, hats,
9 bibs, business cards, promotional gift cards, and even crab mallets. (*Id.* at ¶¶ 17-23, Ex. L, M, N,
10 O, P Q, & R.)

11 In addition to traditional advertising channels, Sinhdarella has used the trademark
12 THE BOILING CRAB extensively on the Internet and, as a result, Sinhdarella's THE BOILING
13 CRAB trademark has also developed a strong, nationwide Internet presence and recognition by
14 consumers who use the Internet. Sinhdarella is the registrant of various domain names
15 incorporating, in whole or in part, its THE BOILING CRAB trademark, including
16 theboilingcrab.com and boilingcrab.com. (*Id.* at ¶ 11.) Sinhdarella owns and operates a website
17 at these domain names in order to promote and provide consumers with information concerning
18 Sinhdarella's THE BOILING CRAB restaurant chain. (*Id.* at ¶ 12, Ex. G.) Sinhdarella's website
19 makes extensive use of THE BOILING CRAB trademark and embodies part of the unique look-
20 and-feel of THE BOILING CRAB restaurants. (*Id.*)

21 In addition to owning and operating a THE BOILING CRAB website at
22 theboilingcrab.com, Sinhdarella also uses its trademark THE BOILING CRAB extensively on
23 the internet through the popular social networking site, myspace.com. (*Id.* at ¶ 13, Ex. H.) In
24 particular, Sinhdarella maintains a page at myspace.com/theboilingcrab in order to further
25 promote its THE BOILING CRAB trademark and to provide information about and further
26 promote its chain of THE BOILING CRAB restaurants. (*Id.*)

27 Sinhdarella's THE BOILING CRAB chain of restaurants has become extremely
28 well known and well respected among consumers, who have come to associate Sinhdarella's

1 THE BOILING CRAB trademark with Sinhdarella's THE BOILING CRAB restaurants and
2 their distinctive dining experience. Sinhdarella's THE BOILING CRAB restaurants have also
3 received unsolicited attention from, and positive recognition by, the media, which has further
4 contributed to consumers' widespread recognition of Sinhdarella's THE BOILING CRAB
5 restaurants. Examples of media coverage of Sinhdarella's include pieces in LA Weekly, Orange
6 County Weekly, and Internet blog sites. (*Id.* at ¶¶ 24-26, Ex. S, T, & U.) Sinhdarella's THE
7 BOILING CRAB restaurants have also received positive reviews on the Internet restaurant
8 review site Yelp.com. (Declaration of Andrew Fossum ("Fossum Dec.") at ¶ 2.)

9 In addition to widespread recognition of Sinhdarella's THE BOILING CRAB
10 restaurants by consumers, THE BOILING CRAB restaurants also enjoy a particularly large
11 following among the Vietnamese-American community in the United States. Shortly after
12 opening, Viet Thao, an extremely popular emcee for a series of DVDs viewed widely in the
13 Vietnamese-American community throughout the United States, visited the original THE
14 BOILING CRAB location opened by Sinhdarella. (Ngo Dec. at ¶ 30, Ex. V.) Because he
15 enjoyed his experience there, Mr. Thao offered to include a segment about Sinhdarella's THE
16 BOILING CRAB restaurants on his upcoming DVD entitled, "Van Son in Little Saigon 2." (*Id.*)
17 This DVD, obtained by Sinhdarella in the first half of 2006 (apparently released in 2005) and
18 distributed throughout the United States, gave significant exposure to THE BOILING CRAB
19 restaurants in the Vietnamese-American community throughout the United States, and after its
20 release, Sinhdarella received numerous inquiries about THE BOILING CRAB restaurants from
21 throughout California, including San Jose, San Diego and Los Angeles. (*Id.*)

22 Early in 2007, SaigonTV approached Sinhdarella and asked if it would be willing
23 to appear in SaigonTV's "What's Hot" segment covering the growing popularity of crawfish
24 restaurants among the Vietnamese-American community inspired by Sinhdarella's THE
25 BOILING CRAB restaurants. (*Id.* at ¶ 31, Ex. W.) SaigonTV informed Sinhdarella that it
26 understood that Sinhdarella was the "pioneer" of its type of crawfish restaurant. (*Id.*) This
27 segment again put the spotlight on Sinhdarella and its THE BOILING CRAB trademark and
28 highlighted THE BOILING CRAB's place in the Vietnamese-American community as a pioneer

1 of the rapidly growing “cajun-food or crawfish restaurant.” (*Id.*) Once again, homes all across
 2 the United States were exposed to THE BOILING CRAB restaurants, only this time on cable
 3 television in English rather than a Vietnamese-language DVD. (*Id.*)

4 Based on the huge popularity and success of Sinh darella’s THE BOILING CRAB
 5 restaurants, Sinh darella has expanded its chain of THE BOILING CRAB restaurants from its
 6 original location in Garden Grove, California to include locations throughout the United States,
 7 including three THE BOILING CRAB restaurants in California; a THE BOILING CRAB
 8 restaurant in Houston, Texas; and a THE BOILING CRAB restaurant which will open in the
 9 near future in Dallas, Texas. (*Id.* at ¶ 32.) Sinh darella is also actively exploring further
 10 expansion of its chain of THE BOILING CRAB restaurants to additional locations throughout
 11 the United States, including Seattle, Washington; Richmond, Virginia; and additional locations
 12 in California, including the Bay Area. (Ngo Dec. at ¶¶ 27-29; S. Nguyen Dec. at ¶¶ 2-9.)

13 **B. Defendant’s “The Boiling Crab” Restaurant**

14 Defendant is an individual who currently operates a restaurant in San Jose,
 15 California under the name “The Boiling Crab.” (De Vries Dec. at ¶ 3, Ex. B.) Defendant opened
 16 and began operating his restaurant recently, several years after Sinh darella first began using its
 17 THE BOILING CRAB trademark and distinctive trade dress. Defendant’s “The Boiling Crab”
 18 restaurant imitates in all material respects not only the name, but also the distinctive trade dress,
 19 of Sinh darella’s THE BOILING CRAB restaurants. (*See, e.g.*, Declaration of Giang Nguyen
 20 (“G. Nguyen Dec.”) at ¶ 9, Ex. B, C, & D.)

21 Defendant uses Sinh darella’s THE BOILING CRAB mark in connection with his
 22 restaurant even though Defendant does not have any affiliation with, or authorization from,
 23 Sinh darella. (Ngo Dec. at ¶ 33.) The name “The Boiling Crab” appears on the exterior signage
 24 of Defendant’s restaurant, on Defendant’s menus, and on Internet sites referring to Defendant’s
 25 restaurant such as the Internet restaurant review site Yelp.com. (G. Nguyen Dec. at ¶ 9, Ex. B &
 26 D; De Vries Dec., Ex. F.)

27 Defendant’s restaurant further imitates Sinh darella’s THE BOILING CRAB
 28 restaurants by offering precisely the same types of food offered by Sinh darella’s THE BOILING

CRAB restaurant and by copying the unique trade dress used by Sinhdarella's THE BOILING CRAB restaurants. Defendant's menu is virtually an identical copy of the menu used by Sinhdarella around the time that Defendant opened his "The Boiling Crab" restaurant. (*Compare* G. Nguyen Dec., Ex. D *with* Ngo Dec., Ex. A.) As can be seen by comparing the menus, Defendant's menu is the exact same shape (rectangular), size (4.25"x11"), and color (orange) as the menu for Sinhdarella's THE BOILING CRAB restaurants used around the time that Defendant opened his infringing restaurant. (*Id.*) Additionally, Defendant's menu offers the same five entrees (crab, oysters (raw), crab, crawfish, and shrimp), two of the same extras in the same order (corn and sausage), and the same drinks in the same order (soda, bottled water, domestic beer, and imported beer) as does Sinhdarella's THE BOILING CRAB menu. (*Id.*) In fact, Defendant's imitation of Sinhdarella's THE BOILING CRAB restaurants is so complete that Defendant even advertises precisely the same hours of operation as those used by Sinhdarella's THE BOILING CRAB restaurants: Mon-Fri 3:00 pm-10:00 pm and Sat-Sun 12:00 pm-10:00 pm! (*Id.*)

The similarities between Defendant's restaurant and Sinhdarella's THE BOILING CRAB restaurants do not stop at Defendant's use of the same name and a clearly copied menu. As can be seen by comparing the interior of Defendant's restaurant with a copy of the interior of a genuine Sinhdarella THE BOILING CRAB restaurant, Defendant's restaurant also imitates the unique trade dress of Sinhdarella's THE BOILING CRAB restaurants. (*Compare* G. Nguyen Dec., Ex. C *with* Ngo Dec., Ex. C.) Defendant's restaurant copies the overall look and feel of the interior of Sinhdarella's THE BOILING CRAB restaurants, imitating the color of the walls, the signs on the walls, the hanging of fishing nets on the walls, affixing sculptures of red-colored crustaceans on the walls, and even the configuration of the tables and chairs. (*Id.*)

C. Actual Consumer Confusion Caused by Defendant

Not surprisingly, given Defendant's wholesale counterfeiting of Sinhdarella's genuine THE BOILING CRAB restaurants, Defendant's imitation of Sinhdarella's THE BOILING CRAB restaurants and unauthorized use of THE BOILING CRAB trademark and Sinhdarella's distinctive trade dress has already caused significant actual confusion among

1 consumers. Despite the limited discovery in this action to date, Sinhdarella already possesses
2 substantial evidence of actual consumer confusion caused by Defendant's use of Sinhdarella's
3 trademark. Various consumers including Uyen Tran, Thuy Weisshaut, Nina Ngo, Lan Vu, and
4 Kayla Nguyen, declarations from whom are filed herewith, have informed Sinhdarella that they
5 visited Defendant's restaurant in San Jose mistakenly thinking that Defendant's "The Boiling
6 Crab" restaurant was affiliated with Sinhdarella's THE BOILING CRAB restaurants. (Appendix
7 of Customer Declarations, Ex. A-E (collectively "Customer Decs.")). These consumers, who
8 were familiar with the authentic THE BOILING CRAB restaurants, quickly suspected that
9 Defendant's restaurant was not an authorized THE BOILING CRAB restaurant, given the low
10 quality of Defendant's food, but only after being lured into Defendant's restaurant. (*Id.*)

11 This confusion is consistent with that reported by other consumers to
12 Sinhdarella's employees at THE BOILING CRAB restaurants. As early as 2006, employees at
13 Sinhdarella's THE BOILING CRAB began hearing from customers that they thought the San
14 Jose restaurant operating under the name "The Boiling Crab" was affiliated with Sinhdarella's
15 THE BOILING CRAB restaurants. (See Appendix of Employee Declarations, Ex. A-N
16 (collectively "Employee Decs.")). Even though Sinhdarella's employees have attempted to
17 correct the confusion at every opportunity, these incidents of confusion caused by Defendant's
18 unauthorized use of THE BOILING CRAB trademark continue to this date. (*Id.*)

19 Unfortunately, some customers of Defendant's restaurant have not only expressed
20 confusion; they have also complained to *Sinhdarella* about the low quality of *Defendant's*
21 restaurant. For example, one customer asked a THE BOILING CRAB employee to explain why
22 Defendant's restaurant never has crab in stock. (Appendix of Employee Declarations, Ex. E at
23 ¶ 3.) Other customers have said that they got sick at Defendant's restaurant and associated that
24 unpleasant experience with Sinhdarella's THE BOILING CRAB restaurants. (Appendix of
25 Employee Declarations, Ex. I at ¶ 3.) Another customer said he had tried "the San Jose location"
26 and "it sucked." (Appendix of Employee Declarations, Ex. L at ¶ 3.) Yet another customer
27 described being deceived into thinking Defendant's restaurant and Sinhdarella's restaurants were
28

1 affiliated specifically because of the similar menu and décor of the Defendant's restaurant.
 2 (Appendix of Employee Declarations, Ex. M at ¶ 3.)

3 Consumers have also expressed their confusion over Defendant's use of
 4 Sinhdarella's THE BOILING CRAB trademark via the Internet. For example, on January 17,
 5 2007, Sinhdarella received an email to its Yahoo! mail account from a customer who was
 6 confused that Defendant's "The Boiling Crab" was affiliated with "the ones in Orange County."
 7 (Ngo Dec. at ¶ 14.)

8 **D. Sinhdarella's Attempts to Resolve This Dispute Amicably**

9 Prior to filing suit, Sinhdarella made every effort to persuade Defendant to
 10 voluntarily cease using Sinhdarella's trademark. On October 2, 2006, Sinhdarella sent the first
 11 of many letters asking Defendant to stop infringing its trademark rights. (Ngo Dec. at ¶ 15,
 12 Ex. J.) Defendant did not respond to this letter.

13 On May 22, 2007, counsel for Sinhdarella sent another letter to Defendant
 14 objecting to Defendant's unauthorized use of Sinhdarella's THE BOILING CRAB trademark.
 15 (De Vries Dec. at ¶ 4, Ex. C.) That letter demanded, among other things, that Defendant
 16 immediately stop using the trademark THE BOILING CRAB. (*Id.*)

17 On June 26, 2007, having not heard anything from Defendant in response to the
 18 October 2, 2006 or May 22, 2007 letters, counsel for Sinhdarella sent another letter to Defendant,
 19 again objecting to Defendant's unauthorized use of Sinhdarella's THE BOILING CRAB
 20 trademark and repeating the demands contained in the May 22, 2007 letter. (*Id.* at ¶ 5, Ex. D.)

21 On July 23, 2007, still having not heard anything from Defendant in response to
 22 any of the other three letters, counsel for Sinhdarella sent another letter to Defendant – this time
 23 by hand delivery directly to Defendant's restaurant – again objecting to Defendant's
 24 unauthorized use of Sinhdarella's THE BOILING CRAB trademark and once again repeating the
 25 demands contained in Sinhdarella's May 22, 2007 letter. (*Id.* at ¶ 6, Ex. E.)

26 Despite Sinhdarella's repeated demands that Defendant stop his blatant
 27 infringement of Sinhdarella's THE BOILING CRAB trademark, Defendant completely ignored
 28 Sinhdarella's efforts to reach an informal resolution of this matter and continued, unabashedly,

1 with his brazen infringement of Sinhdarella's THE BOILING CRAB trademark and trade dress
 2 rights. Consequently, Sinhdarella was forced to file this lawsuit asserting claims for trademark
 3 and trade dress infringement against Defendant on August 23, 2007.

4 Sinhdarella's efforts to resolve this suit amicably did not stop after the complaint
 5 was filed. On September 12, 2007, Defendant finally obtained counsel and filed an answer
 6 shortly thereafter. Almost immediately after Defendant's answer was filed, Defendant's counsel
 7 withdrew, and Defendant opted to proceed *pro se*. Over the next few months, counsel for
 8 Sinhdarella attempted to make progress in this the litigation and to get Defendant to agree to stop
 9 using the name "The Boiling Crab." Although the parties scheduled a Rule 26(f) conference on
 10 September 24, 2007, Defendant unilaterally cancelled the conference a few hours before it was
 11 scheduled. (De Vries Dec. at ¶ 8, Ex. G.) Defendant then delayed any progress in this litigation
 12 by refusing to participate in the Rule 26(f) conference until the last possible day, November 9,
 13 2007, at one point writing to counsel for Sinhdarella that "i am ignoring your questions and
 14 demands, bc i think u r crazy." (*Id.* at ¶ 9, Ex. H.) On November 8, 2007, Defendant again
 15 retained counsel to represent him in this action.

16 During this time, Defendant temporarily changed the name of his San Jose
 17 restaurant from "The Boiling Crab" to "The Boiling Crawfish." (Declaration of Steve
 18 McFarland ("McFarland Dec.") at ¶ 2, Ex. A.) However, counsel for Defendant recently
 19 explained that he advised Defendant to resume use of the name "The Boiling Crab." (De Vries
 20 Dec. at ¶ 10.) Counsel for Defendant later confirmed that Defendant had indeed resumed using
 21 the name "The Boiling Crab" in connection with his San Jose restaurant. (Fossum Dec., Ex. E at
 22 1.)

23 **E. The Increasing Scope of Defendant's Infringement**

24 Based on rumors that Defendant was preparing to open a second restaurant in
 25 Sacramento, California, counsel for Sinhdarella asked Defendant (at a time when Defendant was
 26 appearing *pro se*) whether Defendant had any plans to open another restaurant, during a phone
 27 conversation with Defendant. (De Vries Dec. at ¶ 11.) During that conversation, Defendant told
 28

1 Sinhdarella's counsel that he had lied to his suppliers about starting a second restaurant to get
2 better prices. (*Id.*)

3 In fact, Defendant *did* have plans to open a restaurant in Sacramento, under the
4 name "The Boiling Crawfish." (McFarland Dec. at ¶ 3, Ex. B, C, & D.) A sign outside this
5 restaurant states that it will open on December 21, 2007. (*Id.*, Ex. C.) To promote the new
6 restaurant, Defendant also appears to have asked an associate named in his initial disclosures,
7 Mr. Bryan Bao, to register the domain name www.theboilingcrawfish.com. (Fossum Dec.,
8 Ex. C.) The website appearing at www.theboilingcrawfish.com contains an explicit reference to
9 "The Boiling Crab." (*Id.*, Ex. D.)

10 **IV. ARGUMENT**

11 **A. Legal Standard to Obtain a Preliminary Injunction**

12 Sinhdarella seeks to enjoin Defendant's willful trademark infringement by
13 prohibiting Defendant's use of Sinhdarella's common law and federally registered THE
14 BOILING CRAB mark or any confusingly similar mark, in connection with the operation of any
15 restaurant or providing restaurant services. To obtain a preliminary injunction, Sinhdarella need
16 only demonstrate "either (1) a combination of probable success on the merits and the possibility
17 of irreparable injury or (2) the existence of serious questions going to the merits and that the
18 balance of hardships tips sharply in its favor." *Goto.com, Inc. v. Walt Disney Co.*, 202 F.3d
19 1199, 1205 (9th Cir. 2000) (internal citations omitted).

20 To show probable success on the merits, a plaintiff alleging trademark
21 infringement must establish that it is likely to be able to show a likelihood of confusion between
22 the marks. *Id.* If successfully demonstrated, irreparable injury to the plaintiff may be presumed.
23 *Nautilus Group, Inc. v. Icon Health and Fitness, Inc.*, 372 F.3d 1330, 1334 (Fed. Cir. 2004).
24 Alternatively, Sinhdarella is entitled to a preliminary injunction if it can show that the balance of
25 hardships tips sharply in its favor. Notably, "[t]hese are not two distinct tests, but rather opposite
26 ends of a single continuum in which the required showing of harm varies inversely with the
27 required showing of meritoriousness." *Republic of the Phillipines v. Marcos*, 862 F.2d 1355,
28 1362 (9th Cir. 1988) (internal citation and quotation marks omitted). As set forth below,

1 Sinhdarella is entitled to a preliminary injunction because it can make the requisite showing at
2 either end of the continuum.

3 **B. Sinhdarella Is Entitled to a Preliminary Injunction Because There Is No**
4 **Question It Will Show Defendant Is Likely to and Has Caused Consumer**
5 **Confusion**

6 As noted, to succeed on a claim of trademark infringement, a plaintiff must show
7 a likelihood of confusion between the marks at issue. In the Ninth Circuit, an eight-factor test is
8 employed to determine whether there is a likelihood of confusion in trademark infringement
9 cases. The factors considered are: (1) similarity of the marks; (2) proximity or relatedness of the
10 goods or services; (3) strength of plaintiff's mark; (4) marketing channels; (5) the degree of care
11 likely to be exercised by purchasers; (6) defendant's intent; (7) evidence of actual confusion; and
12 (8) likelihood of expansion. *Brookfield Communs., Inc. v. West Coast Entertainment Corp.*, 174
13 F.3d 1036, 1054 (9th Cir. 1999). "Some factors are much more important than others and the
14 relative importance of each individual factor will be case-specific." *Id.* Further, "it is often
15 possible to reach a conclusion with respect to likelihood of confusion after considering only a
16 subset of the factors." *Id.* In fact, where the marks are identical and "used with identical
17 products or services likelihood of confusion would follow as a matter of course." *Id.* at 1056.
18 As discussed below, this is precisely the situation presented to the Court in the instant case.
19 Hence, Defendant's use of Sinhdarella's THE BOILING CRAB trademark creates a clear
20 likelihood of confusion, and Sinhdarella will certainly prevail on the merits of its claims.

21 The name of Defendant's restaurant is precisely the same as Sinhdarella's THE
22 BOILING CRAB mark. Moreover, Defendant's restaurant is virtually identical in every other
23 respect, offering the exact same types of food and emulating the same interior décor as
24 Sinhdarella's THE BOILING CRAB restaurants. According to *Brookfield*, these facts alone
25 should be sufficient to establish a likelihood of confusion. *Id.* Nevertheless, every other factor
26 likewise weighs in favor of a finding of a likelihood of confusion and therefore a preliminary
27 injunction should be granted.

Similarity of the Marks. “Obviously, the greater the similarity between the two marks at issue, the greater the likelihood of confusion.” *Goto.com*, 202 F.3d at 1206. *The marks at issue in this case are identical.* Sinhdarella is the owner of a federally registered standard character mark for “THE BOILING CRAB.” (De Vries Dec., Ex. A.) In addition, Sinhdarella has established common law rights throughout the United States by using the mark THE BOILING CRAB in connection with restaurant services since at least as early as 2004. (Ngo Dec. at ¶¶ 3 & 16.) Sinhdarella uses its THE BOILING CRAB mark on the exterior of its restaurants; on its menus; on promotional materials such as T-shirts, hats, gift cards, business cards, and crab mallets; throughout the Internet including on its website, myspace.com page, and third party websites such as Yelp.com; and in its advertising and marketing collateral. (*Id.* at ¶¶ 5-6, 9-13 & 16-23; Fossum Dec., Ex. A.) Sinhdarella has also received unsolicited media attention from sources as the “Van Son in Little Saigon 2” DVD distributed throughout the United States from as far back as 2005. (Ngo Dec. at ¶ 30, Ex. V.)

Defendant also uses Sinhdarella’s trademark – a sign bearing the name “The Boiling Crab” – on the exterior of his restaurant located at 393 N. Capitol Ave., San Jose, CA 95133.¹ (G. Nguyen Dec. at ¶ 9, Ex. B.) Defendant uses Sinhdarella’s THE BOILING CRAB trademark on his menus. (*Id.* at ¶ 9, Ex. D.) Defendant’s use of Sinhdarella’s THE BOILING CRAB trademark also extends to the Internet, where it is used to refer to Defendant’s infringing restaurant in virtual juxtaposition to Sinhdarella’s THE BOILING CRAB trademark on the website Yelp.com. (De Vries Dec., Ex. F.)

Although Defendant’s exterior sign employs a slightly different font than Sinhdarella’s exterior signs, this exceedingly minor difference is immaterial, including because

¹ For a short period of time from about September 2007 to December 2007, Defendant altered the exterior sign on his restaurant to read “The Boiling Crawfish” instead of “The Boiling Crab”. (*See, e.g.*, McFarland Dec. at ¶ 2, Ex. A.) During this time, Sinhdarella believes that Defendant continued to use the name “The Boiling Crab” on its menus. Regardless, Sinhdarella maintains that the name “The Boiling Crawfish” is confusingly similar to its THE BOILING CRAB trademark. In any event, Defendant has resumed use of the name “The Boiling Crab” and has stated an intent to continue that use. (Fossum Dec., Ex. E.) Accordingly, Sinhdarella has focused this motion on Defendant’s use of the name “The Boiling Crab.”

“restaurants are often recommended by word of mouth and referred to orally, [so] it is the word portion of [a] mark which is more likely to be impressed on the consumer’s memory.” *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997). In addition, “the marks must be considered in their entirety and as they appear in the marketplace.” *Brookfield*, 174 F.3d at 1054. In many places where consumers are exposed to the mark at issue, such as restaurant reviews, phone listings, and on Internet sites like Yelp.com, Defendant’s infringing use of Sinhdarella’s mark is indistinguishable from Sinhdarella’s use of its mark. Finally, when evaluating the similarity of the marks, “similarities [are] weighed more heavily than differences.” *Id.* Under this standard, minor differences in font appearing only on the exterior signage of Defendant’s restaurant are wholly insufficient to overcome the inescapable fact that the name of Defendant’s restaurant, “The Boiling Crab,” is identical to Sinhdarella’s THE BOILING CRAB trademark. Accordingly, this factor weighs heavily in favor of finding a likelihood of confusion.

Proximity or Relatedness of the Goods or Services. “[T]he more closely related the goods are, the more likely consumers will be confused by similar marks.” *Entrepreneur Media v. Smith*, 279 F.3d 1135, 1147 (9th Cir. 2002). As with the name used by Defendant, the services offered by Defendant’s restaurant are in all material respects identical to those offered by Sinhdarella’s THE BOILING CRAB restaurants. The only differentiating factor – the apparently lower quality of Defendant’s food – serves only to damage Sinhdarella’s reputation, rather than to alleviate confusion.

Defendant’s restaurant emulates virtually every aspect of Sinhdarella’s THE BOILING CRAB restaurants, from the food that is sold to the look-and-feel of the establishment. First, Defendant’s menu offers the same five entrees (crab, oysters (raw), crab, crawfish, and shrimp), two of the same extras in the same order (corn and sausage), and the same drinks in the same order (soda, bottled water, domestic beer, and imported beer) as does Sinhdarella’s THE BOILING CRAB menu. (*Compare* G. Nguyen Dec., Ex. D *with* Ngo Dec., Ex. A.) Second, Defendant’s restaurant also mimics the overall, nonfunctional configuration of Sinhdarella’s THE BOILING CRAB restaurants, including by imitating the color of the walls, the signs on the walls, the hanging of fishing nets on the walls, affixing sculptures of red-colored crustaceans on

the walls, the configuration of the tables and chairs, and the overall look-and-feel of the restaurant. (G. Nguyen Dec., Ex. C with Ngo Dec., Ex. C.) Third, Defendant's menu is virtually an identical copy of the menu used by Sinhdarella around the time that Defendant opened his "The Boiling Crab" restaurant. (*Compare* G. Nguyen Dec., Ex. D with Ngo Dec., Ex. A.) Defendant's menu is the exact same shape (rectangular), size (4.25"x11"), and color (orange) as the menu for Sinhdarella's THE BOILING CRAB restaurants used around the time that Defendant opened his infringing restaurant. (*Id.*) Fourth, Defendant's prices for most menu items are the same as Sinhdarella's and in the same general price range for the remainder of the menu items. (*Id.*) Fifth, Defendant's imitation of Sinhdarella's THE BOILING CRAB restaurants is so complete that Defendant even copied precisely the same hours of operation as those used by Sinhdarella's THE BOILING CRAB restaurants: Mon-Fri 3:00 pm-10:00 pm and Sat-Sun 12:00 pm-10:00 pm. (*Id.*)

In summary, Defendant operates a restaurant with the exact same name, selling the exact same food at the same prices with the same interior décor as Sinhdarella's restaurants. The fact that Defendant offers the same type of food under the same name should alone be sufficient to establish a likelihood of confusion. *See Brookfield*, 174 F.3d at 1056 (likelihood of confusion follows as a matter of course when the same mark is used on identical products or services). Moreover, Defendant's imitation of the other aspects of Sinhdarella's THE BOILING CRAB restaurants provides additional compelling evidence that consumer confusion is not only likely, but follows as a matter of course. *See, e.g., Newport Pacific Corp. v. Moe's Southwest Grill, LLC*, No. 05-995-K1, 2006 WL 2811905, at *12-13 (D. Or. Sept. 28, 2006) (noting that look-and-feel of two restaurants is relevant to the relatedness of the goods). Coupled with the precise similarity of the marks, this factor should be dispositive in Sinhdarella's favor on the issue of likelihood of confusion. At a minimum, it too weighs heavily in favor of finding a likelihood of confusion.

Evidence of Actual Confusion. The Court need not rely on a presumption that Defendant can accomplish his goal to confuse consumers; even prior to obtaining discovery from Defendant, Sinhdarella has produced significant evidence of instances of actual confusion in the

1 form of declarations from consumers, a consumer email, and declarations from employees
2 reporting instances of consumer confusion. The consumer declarations produced by Sinhdarella
3 compellingly establish that Defendant's strategy of operating under a name identical to
4 Sinhdarella's THE BOILING CRAB trademark has effectively taken advantage of the
5 substantial goodwill established by Sinhdarella by confusing unsuspecting consumers. (*See*
6 *Customer Decs.*) On the numerous occasions discussed in the declarations and likely many other
7 occasions currently unknown to Sinhdarella, Defendant obtained business by deceiving
8 customers into believing that they would receive the experience that they have come to expect
9 from Sinhdarella's THE BOILING CRAB restaurants. (*Id.*; *see also* Appendix of Employee
10 Declarations, Ex. M at ¶ 3 (relaying a customer report describing being tricked specifically by
11 the similar menu and décor).)

12 In addition to the consumer declarations submitted by Sinhdarella in support of
13 this motion, Sinhdarella's employees also report significant evidence that Defendant's restaurant
14 has caused a massive amount of consumer confusion. From 2006 until the present, numerous
15 customers have been expressing confusion to Sinhdarella's employees concerning the perceived
16 relationship between Sinhdarella's THE BOILING CRAB restaurants and Defendant's
17 infringing restaurant. (*See* Employee Decs.) In addition to confusion, Sinhdarella's employees
18 have witnessed firsthand the damage that Defendant's substandard service and food have caused
19 to the impeccable reputation of Sinhdarella's THE BOILING CRAB restaurants. (Appendix of
20 Employee Declarations, Ex. E at ¶ 3; Ex. I at ¶ 3; & Ex. L at ¶ 3.)

21 Consumer confusion has also extended to the Internet. For example, in January
22 2007, Sinhdarella received an email from a consumer inquiring whether Defendant's restaurant
23 was affiliated with Sinhdarella's THE BOILING CRAB restaurants. (Ngo Dec. at ¶ 14, Ex. I.)

24 Given the significant evidence of actual confusion caused by Defendant's
25 infringement that Sinhdarella has been able to compile even at this early stage of the litigation, it
26 is likely that Sinhdarella will ultimately be able to introduce overwhelming evidence of actual
27 confusion by the time of trial. Because "[e]vidence of actual confusion is strong evidence that
28

future confusion is likely,” this factor weighs heavily in favor of finding a likelihood of confusion. *Entrepreneur*, 279 F.3d at 1150.

Defendant’s Intent. “Intent to deceive is strong evidence of a likelihood of confusion.” *Entrepreneur*, 279 F.3d at 1148. “When the alleged infringer knowingly adopts a mark similar to another’s, reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived.” *Id.*

As discussed above, Defendant uses the exact same name as Sinh darella’s THE BOILING CRAB restaurants. Defendant serves precisely the same types of food as Sinh darella’s THE BOILING CRAB restaurants. Defendant’s menu is the same color, size, and offers many of the same items appearing in precisely the same order as they appear on Sinh darella’s menu. Defendant’s restaurant mimics the interior décor of Sinh darella’s THE BOILING CRAB restaurants. Defendant even has the same hours of operation.

Sinh darella submits that the “similarities” between Defendant’s restaurant and Sinh darella’s THE BOILING CRAB restaurants are so extensive that they could not possibly be the result of anything other than intentional copying by the Defendant. At the time Defendant opened his restaurant, he must have been familiar with Sinh darella’s THE BOILING CRAB restaurants and intentionally adopted the same name and trade dress for the purpose of capitalizing on the extensive consumer goodwill that Sinh darella has established throughout the United States and in the Vietnamese-American community located across the country. From this, the Court should presume that Defendant can accomplish his purpose to confuse consumers. *Entrepreneur*, 279 F.3d at 1148. Hence, this factor also weighs heavily in favor of finding a likelihood of confusion.

Strength of the Plaintiff’s Mark. As discussed, Sinh darella’s THE BOILING CRAB mark is federally registered. (De Vries Dec., Ex. A.) Sinh darella’s registration is “prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant’s ownership of the mark, and of the registrant’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registration.” 15 U.S.C. § 1115(a). In addition to the rights conferred by federal registration, Sinh darella has

1 used its THE BOILING CRAB trademark extensively in connection with its restaurants since at
 2 least as early as 2004. (Ngo Dec. at ¶¶ 3-13 & 16-26.) It has received widespread, national
 3 positive recognition and exposure from the media, including particularly widespread recognition
 4 among the Vietnamese-American community throughout the United States. (Ngo Dec. at ¶¶ 24-
 5 26 & 30-31, Ex. S, T, U, V & W.) As a result of its federal registration and the strength of its
 6 common law mark, this factor also weighs in favor of finding a likelihood of confusion.

7 **Degree of Care Likely to be Exercised by Purchasers.** “In assessing the
 8 likelihood of confusion to the public, the standard used by the courts is the typical buyer
 9 exercising ordinary caution. Although the wholly indifferent may be excluded, the standard
 10 includes the ignorant and the credulous. When the buyer has expertise in the field, a higher
 11 standard is proper though it will not preclude a finding that confusion is likely. Similarly, when
 12 the goods are expensive, the buyer can be expected to exercise greater care in his purchases;
 13 again, though, confusion may still be likely.” *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 353
 14 (9th Cir. 1979) (internal citations and quotations omitted).

15 The restaurant services at issue here are relatively inexpensive. (See G. Nguyen,
 16 Ex. D; see also Ngo Dec., Ex. A.) Consequently, consumers are not likely to exercise a high
 17 degree of care. *Sleekcraft*, 599 F.2d at 353. Moreover, the significant evidence that actual
 18 consumers have already been confused by Defendant’s emulation of Sinhdarella’s THE
 19 BOILING CRAB restaurants submitted with this Motion establishes that the degree of care
 20 exercised by typical restaurant consumers will not alleviate the clear confusion caused by
 21 Defendant’s use of an identical name. (See Customer Decs.) Considering the relative cost of the
 22 goods at issue and the substantial evidence of actual consumer confusion discussed above, this
 23 factor also weighs in favor of finding a likelihood of confusion.

24 **Marketing Channels.** “Convergent marketing channels increase the likelihood
 25 of confusion.” *Sleekcraft*, 599 F.2d at 353. Both Defendant’s restaurant and Sinhdarella’s THE
 26 BOILING CRAB restaurants, like most restaurants, rely on word-of-mouth advertising. In
 27 addition, Sinhdarella’s THE BOILING CRAB restaurants are widely known in the Vietnamese-
 28 American community located throughout the United States. (Ngo Dec. at ¶¶ 30-31, Ex. V & W.)

Defendant's restaurant apparently targets many of the same consumers. (Customers Decs.) Further, both restaurants have been extensively reviewed on the restaurant review site Yelp.com, where Defendant's restaurant has received poor reviews (2.5 stars) compared to those received by Sinhdarella's THE BOILING CRAB restaurants (4 stars). (*Compare* Fossum Dec., Ex. A with Fossum Dec., Ex. B.) The similarities between the methods and channels of marketing used by both Defendant and Sinhdarella can only serve to increase the likelihood of confusion. This factor too weighs in favor of finding a likelihood of confusion.

Likelihood of Expansion. Likelihood of expansion is less relevant when the marks operate on the same products or in the same markets. *See Brookfield*, 174 F.3d at 1036 (noting that likelihood of expansion is "relatively unimportant" where two companies already compete to a significant extent). Sinhdarella operates THE BOILING CRAB restaurants throughout California and nationally, and Defendant's restaurant and Sinhdarella's THE BOILING CRAB restaurants cater to many of the same consumers. (Customer Decs.)

Notwithstanding the obvious existing overlap in products and market, "[a] strong likelihood that either party may expand his business to compete with the other favors a finding of infringement." *Official Airline Guides v. Goss*, 6 F.3d 1385, 1394 (9th Cir. 1993). Since opening the original THE BOILING CRAB restaurant, Sinhdarella has been expanding its chain of restaurants throughout the United States. THE BOILING CRAB chain of restaurants now has three California locations, a location in Houston, Texas, and a location in Dallas, Texas that will open soon. (Ngo Dec. at ¶ 32.) In addition, Sinhdarella is actively working to open additional THE BOILING CRAB restaurants in San Jose, California; Seattle, Washington; and Richmond, Virginia. (Ngo Dec. at ¶ 28; S. Nguyen Dec. at ¶¶ 7-9.)

Notably, long before Defendant opened his infringing restaurant in San Jose, Sinhdarella had actively explored opening a THE BOILING CRAB restaurant in San Jose and had even actively searched for suitable locations. (S. Nguyen Dec. at ¶¶ 2-4.) Prior to and during the same time that Defendant opened his restaurant in San Jose, Sinhdarella was working with Giang Nguyen to open a THE BOILING CRAB restaurant in San Jose. (S. Nguyen Dec. at ¶¶ 2 & 5-7; G. Nguyen Dec. at ¶¶ 2-6.) Mr. Nguyen's plans had advanced to the stage of

1 reviewing several potential lease sites in San Jose and entertaining offers to purchase existing
 2 restaurants to convert to a THE BOILING CRAB restaurant. (G. Nguyen Dec. at ¶ 6.) Mr.
 3 Nguyen actually moved to San Jose to pursue opening a San Jose THE BOILING CRAB
 4 restaurant. (*Id.*) Unfortunately, Sinhdarella's plans to open a San Jose location were thwarted by
 5 Defendant's infringement; Mr. Nguyen was unable to find another suitable location after several
 6 months of searching and chose to move back to Texas and open the forthcoming Dallas THE
 7 BOILING CRAB restaurant instead. (*Id.* at ¶ 8.) Nevertheless, Sinhdarella is still planning to
 8 open a THE BOILING CRAB restaurant in San Jose. (S. Nguyen Dec. at ¶ 8.) On December
 9 12, 2007, Sinh Nguyen and Dada Ngo flew up to San Jose to view a space that is available for
 10 lease and are currently putting together a "Letter of Intent" for the landlord at the property. (*Id.*)

11 The foregoing demonstrates more than a "strong likelihood" that Sinhdarella will
 12 expand its business to compete even more proximately with Defendant's restaurant. In the near
 13 future, Sinhdarella expects to have a THE BOILING CRAB restaurant within miles of
 14 Defendant's current location. Thus, this factor too weighs heavily in favor of a finding of
 15 likelihood of confusion.

16 **Summary of Facts.** Because every factor weighs in favor of finding a likelihood
 17 of confusion, Sinhdarella will certainly prevail on the merits of its trademark infringement claims
 18 against Defendant under 15 U.S.C. § 1114 and 1125 and California law. Hence, Sinhdarella is
 19 being irreparably harmed by Defendant's infringement and is entitled to preliminary injunctive
 20 relief. *See Nautilus Group*, 372 F.3d at 1334 (irreparable injury to the plaintiff may be presumed
 21 upon a showing of likelihood of confusion).

22 **C. The Balance of the Hardships Tips Sharply in Sinhdarella's Favor**

23 Sinhdarella's founders and sole owners, Dada Ngo and Sinh Nguyen, are hard
 24 working middle-class entrepreneurs who have quite literally devoted their entire lives to making
 25 Sinhdarella and its chain of THE BOILING CRAB restaurants a success. Through their hard
 26 work and dedication over the past several years, they have grown their business from a single
 27 location in California to multiple locations throughout California and Texas, with many more on
 28 the way. They have gone to considerable effort to establish and promote their brand throughout

the United States and have had the good fortune of widespread media attention reaching across the United States from as far back as 2005.

Defendant's infringement threatens all that Dada and Sinh have worked so hard to establish. They have suffered significant injury as a result of Defendant's willful and intentional infringement of Sinhdarella's THE BOILING CRAB trademark and trade dress, including as the result of lost customers and business opportunities. As least in part because of the sub-par quality of Defendant's food and service, the confusion caused by Defendant's willful infringement of Sinhdarella's THE BOILING CRAB trademark and trade dress has also caused significant injury to the otherwise impeccable reputation of Sinhdarella's THE BOILING CRAB chain of restaurants, including by virtue of negative reviews written about Defendant's infringing "The Boiling Crab" restaurant.

If Defendant's infringement continues unchecked, the damage to Sinhdarella's THE BOILING CRAB trademark and restaurants will be irreversible. More importantly, Sinhdarella may be unable to obtain *any* compensation from Defendant if it prevails on its claims at trial. Defendant has essentially stated that he is, or intends to make himself, judgment-proof and that perhaps he will leave the country should Sinhdarella obtain a sizable judgment against him. (De Vries Dec. at ¶ 13.) For all of the foregoing reasons, the balance of the hardships tips decidedly in Sinhdarella's favor. Hence, for this reason as well, Sinhdarella is entitled to preliminary injunctive relief.

V. REQUEST FOR RELIEF

In light of all the foregoing, Sinhdarella requests that the Court enter an Order preliminarily enjoining Defendant from operating any restaurant under the name THE BOILING CRAB or any confusingly similar name, including but not limited to "The Boiling Crawfish," during the pendency of this action. As noted above, Defendant has demonstrated an intent to attempt to adopt a name that is similar to Sinhdarella's THE BOILING CRAB trademark if forced to cease using the identical name that he is currently using. Sinhdarella respectfully submits that Defendant's purpose for employing this extremely similar name (and potentially other similar names) is to improperly maintain a connection to Sinhdarella's THE BOILING

1 CRAB trademark and thereby continue to misappropriate Sinhwarella's consumer goodwill and
 2 cause consumer confusion. Courts have established the "Safe Distance Rule" to prohibit
 3 precisely this type of end-run around injunctive relief that Sinhwarella expects from Defendant:

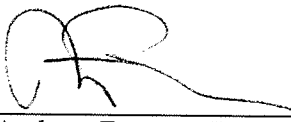
4 "It appears, however, that defendants have attempted to retain the
 5 goodwill they have appropriated by the use of plaintiff's name,
 6 through the use of a name which, while perhaps not confusingly
 7 similar, is so reminiscent of the plaintiff's that it continues to
 8 accord the defendants some of the same unfair advantage they have
 9 previously enjoyed. This they may not do."

10 *Chevron Chemical Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695 (5th
 11 Cir. 1981).

12 For this reason, Sinhwarella requests that Defendant be preliminarily enjoined
 13 from using the confusingly similar name "The Boiling Crawfish" or any other name that is likely
 14 to cause confusion with Sinhwarella's THE BOILING CRAB trademark. Fashioning injunctive
 15 relief in this manner is necessary to protect Sinhwarella from Defendant's continuing trademark
 16 infringement during the pendency of this action and does not present any hardship to Defendant
 17 as he cannot establish that he has any legitimate interest adopting the name "The Boiling
 18 Crawfish" or any other confusingly similar name.

19 Dated: December 28, 2007

LATHAM & WATKINS LLP

20 By 
 21 Andrew Fossum, Esq.

22 Attorneys for Plaintiff
 23 SINHDARELLA, INC.
 24
 25
 26
 27
 28

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 650 Town Center Drive, 20th Floor, Costa Mesa, CA 92626-1925.

On **December 28, 2007**, I served the following document described as:

**PLAINTIFF SINHDARELLA, INC.'S NOTICE OF MOTION AND MOTION FOR
PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES**

by serving a true copy of the above-described document in the following manner:

BY U.S. MAIL

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents with the United States Postal Service; such documents are delivered to the United States Postal Service on that same day in the ordinary course of business, with postage thereon fully prepaid. I deposited in Latham & Watkins LLP' interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service:

Christopher Hays, Esq.
Law Offices of Christopher Hays
One Embarcadero Center, Suite 500
San Francisco, California 94111

Attorneys for Defendant
Kevin Vu

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **December 28, 2007**, at Costa Mesa, California.


Pamela J. Carvalho